ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Assessment and Collection of Regulatory Fees for Fiscal Year 1995	)	MD Docket No. 95-3

COMMENTS OF COMSAT GENERAL CORPORATION

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SUMMARY

A fee must be reasonably related to the direct and indirect costs which the Commission incurs in regulating its licensees. National Cable Television Ass'n v. United States, 554 F. 2d 1094, 1106 (D.C. Cir. 1976). Moreover, the Administrative Procedure Act requires the Commission to make available to the public, "in a form that allows for meaningful comment", the information used to develop its proposed fee schedule. See Engine Mfrs. Ass'n v. EPA, 20 F. 3d 1177, 1181 (D.C. Cir. 1994).

However, the Notice fails to justify the proposed exponential increase in fees for domestic space stations under these standards. Rather, the Notice simply concludes that the cost of regulation will be $4,979,131 without any supporting information, making it impossible for a licensee to determine the specific nature of the regulation undertaken for its benefit or the accuracy of the cost. The Commission must recalculate and reduce the proposed space station fee consistent with the Communications Act and the limitations on its authority to collect fees, not levy taxes.

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COMMENTS OF COMSAT GENERAL CORPORATION

COMSAT General Corporation ("COMSAT General") herein submits its Comments in response to the Federal Communications Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding. COMSAT General, the licensee of the MARISAT F-1, F-2, F-3 and COMSTAR D-4, SBS-2 and SBS-3 domestic fixed-satellites, wishes to comment specifically on the $142,250 annual fee which is proposed to be assessed on operators of satellites operating in the geosynchronous orbit.

Introduction

In August 1993, as part of the Omnibus Reconciliation Act of 1993, Congress added Section 9 to Title I of the Communications Act.[1] Section 9 authorizes the Commission to assess and collect

[1] See 47 U.S.C. § 159(b)(2). The current fee schedule is set forth in 47 C.F.R. §§ 1.1152-1155.

annual regulatory fees "to recover costs incurred in carrying out its enforcement activities, policy and rulemaking activities, user information services and international activities."[2] Subsequently, the Commission adopted rules and a regulatory fee schedule to recover its regulatory costs for Fiscal Year 1994 ("FY 1994").[3] In this Notice, the Commission proposes to revise its method of assessing fees for certain services currently in the fee schedule and, in many cases, to raise exponentially the fees on its licensees to purportedly recover its costs of regulation for Fiscal Year 1995 ("FY 1995"). The fee on space stations, derived by dividing the purported cost of regulation ($4,979,131) by the total number of payees (35), will be $142,250, which is more than 100% higher than the $65,000 fee assessed for FY 1994. COMSAT General's fee will rise from $455,000 for seven satellites in FY 1994 to $853,500 for six feeable satellites in FY 1995.

As discussed in greater detail below, the Notice fails to justify the proposed exponential increase in fees for domestic space stations. Rather, the Notice simply concludes that the cost of regulation will be $4,979,131 without any supporting information, making it impossible for a licensee to determine the specific nature of the regulation undertaken for its benefit or

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[2] Notice, at ¶ 4. These tasks are hereinafter referred to as "Section 9 activities."

[3] Implementation of Section 9 of the Communications Act, 9 FCC Rcd 5333 (1994) ("FY 1994 Order").

the accuracy of the cost. The Commission must recalculate and reduce the proposed space station fee consistent with the Communications Act and the limitations on its authority to collect fees, not levy taxes.

1. The Proposed Fee Constitutes An Unlawful Tax.

It is well settled that "Congress . . . is the sole organ for levying taxes . . . [while a] public agency . . . may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society."[4] A fee is distinguishable from a tax in that it is "a payment for a special privilege or service rendered, and not a revenue measure."[5] The District of Columbia Circuit described the following test by which it can be determined whether a monetary remission to an agency is a permitted fee or a prohibited tax:

> First, the [agency] must justify the assessment of a fee by clear statement of the particular service or benefit which it is expected to reimburse. Second, it must calculate the cost basis for each fee assessed. This involves (a) an allocation of the specific direct and indirect expenses which form the cost basis for the fee to the smallest practical unit; (b) exclusion of any expenses incurred to serve an independent public interest; and (c) a public explanation of the specific expenses included in the cost basis for a particular fee, and an explanation of the criteria used to include

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[4] National Cable Television Ass'n v. United States, 415 U.S. 336, 340 (1973) (emphasis added).

[5] National Cable Television Ass'n v. F.C.C., 554 F.2d 1094, 1106 (D.C. Cir. 1976) ("NCTA").

> or exclude particular terms. Finally, the [agency] must set a fee calculated to return this cost basis at a rate which reasonably reflects the cost of the services performed and value conferred upon the payor.[6]

It follows that "a fee . . . cannot be justified by the revenues received on the profits . . . but must be reasonably related to those attributable direct and indirect costs which the agency actually incurs in regulating (servicing) the industry."[7] Moreover, "the Administrative Procedure Act requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule."[8] Section 9 of the Communications Act substantially embodies these requirements in authorizing the FCC to establish and collect fees to recover the costs of regulation.[9]

However, the FCC has failed to justify the proposed increases in the fees for domestic space stations under these standards. In its original FY 1994 fee schedule, Congress established fees recovering total common carrier revenue of $26.1 million. The Commission now proposes to raise that total revenue

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[6] Electronic Indus. Ass'n v. F.C.C., 554 F.2d 1109, 1117 (D.C. Cir. 1976).

[7] NCTA, 554 F.2d at 1107.

[8] Engine Manufacturers Ass'n v. EPA, 20 F.3d 1177, 1181 (D.C. Cir. 1994).

[9] 47 U.S.C. § 159(a)(1).

requirement to $57 million, an increase of approximately 118%.[10] However, the fees associated with domestic space stations are proposed to increase a far greater percentage. The impact on COMSAT General will be to increase its fees from $65,000 per satellite in 1994 to $142,250 in 1995.

It is unreasonable to believe that the costs of regulation or the benefits received by space station licensees could have increased so dramatically in only one year's time. Indeed, even if possible, any such inference would be negated by the fact that the proposed massive increase in the fees associated with space stations is plainly disproportionate to the overall increase in regulatory costs for the Common Carrier Bureau. This raises serious concerns that the revenues to be collected through the new fees will not be appropriately related to the costs of the regulatory activities of the Bureau on behalf of domestic space station licensees.

The Commission has failed to justify the proposed increase with reference to the permitted amendment factors established in

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[10] COMSAT General recognizes that the regulatory fee provisions of the Communications Act contain language which purports to limit judicial review of "proportionate increases or decreases" in fees and amendments to the initial fee schedule. See 47 U.S.C. §§ 159(b)(2) and (b)(3). However, the proposed increase in fees is not "proportionate" nor necessary in the public interest. See 47 U.S.C. §§ 159(b)(1)(A) and (b)(2). Rather, it constitutes a massively disproportionate increased levy in the nature of a tax.

Section 9 and the cases discussed above.[11] Under existing law, such a purported rationalization is manifestly insufficient to legitimize the proposed increase.[12]

2. The Commission Should Undertake And Publish An Accounting Which Sets Forth The Line Item Costs And Specific Activities For Each Satellite Associated With The Space Station Fee.

Although the Commission has associated a cost of $4,979,311 with regulating feeable international satellites and the Domsat's, the Notice contains absolutely no support for this conclusion.[13] A detailed accounting of the overhead and employees' time and identification of the specific Section 9 activities undertaken for each licensee is necessary to determine the reasonableness of the FCC's determination.[14] COMSAT General believes that such an accounting and a complete identification of the Section 9 activities associated with each satellite could demonstrate that the actual cost of regulating COMSAT General's feeable satellites is negligible.

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[11] Notice, at ¶ 49.

[12] See People of Calif. v. F.C.C., 905 F. 2d 1217, 1230 (9th Cir. 1990).

[13] In fact, the Notice contains no basis for the attribution of $57 million to the common carrier services of the $116 million the FCC is required to collect by the 1995 appropriations act. The Notice also refers to a Full-Time-Employee total of 689 out of a 1046 Full-Time Employee total, but fails to state how any of these numbers were derived.

[14] The Commission could, at minimum, implement a task code charge system to assign the actual costs/benefits attributable to particular users. Such systems are widely used in industry.

3. All Satellites Are Not Equal.

To calculate the space station fee, the Commission divided its costs of regulation ($4,979,131) by 35 (the number of payee units), without showing the derivation of its costs or the number of its payee units. Further, the Notice wrongly lumps domestic satellite space stations together with international space stations, although the Section 9 activities associated with each are completely different.[15] Moreover, the Notice incorrectly assumes that the cost of regulating each individual domestic space station is identical, although Section 9 activities vary

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[15] The Commission has long recognized the dichotomy between its domestic satellite regulatory policies, which are derived from Title III of the Communications Act of 1934, as amended, and its international policies, which emanate from the Communications Satellite Act of 1962, as amended. See Licensing under Title III of the Communications Act of 1934, as amended, of Private Transmit/Receive Earth Stations Operating with the INTELSAT Global Communications System, 3 FCC Rcd 1585 n. 11 (1988) ("Reuters"), aff'd TRT Telecommunications Corp. v. F.C.C., 876 F. 2d 134 (D.C. Cir. 1989). Domestic satellite policies are chiefly concerned with the need to encourage a competitive supply of diverse domestic services and the need to avoid unacceptable interference levels by requiring adequate inter-satellite orbital spacings. See Licensing of Space Stations in the Domestic Fixed-Satellite Service, 88 F.C.C. 2d 318 (1981). The Commission's regulatory policies with respect to feeable international satellites have an entirely different focus, having generally arisen in connection with the Satellite Act, the subsequent establishment of separate satellite systems and the need to coordinate and register international orbital assignments with the ITU. See Modification of Policy on Ownership and Operation of U.S. Earth Stations that Operate with the INTELSAT Global Communications System, 100 F.C.C. 2d 250 (1984); Establishment of Satellite Systems Providing International Communications, 101 F.C.C. 2d 1046 (1985). While there is some overlap with regard to Title III licensing, the Commission's domestic and international satellite Section 9 policy and enforcement activities, have little, if any commonality.

depending on many factors, including a satellite's frequency band,[16] its individual "status"[17] and even its age.[18]

Thus, in FY 1995, the Commission may spend significant time and money in considering the international policy ramifications of the Hughes Galaxy VIII (I) satellite and may spend nothing with respect to the MARISAT F-3. Older satellites (such as SBS-2 and SBS-3), which will likely be removed from orbit within the next six to twenty-four months, are not relevant to any future Commission proceeding related to a Domsat replacement policy. In view of the foregoing, we believe the Commission should re-evaluate its methodology and carefully examine each feeable satellite to ensure that only the specific beneficiary of the Commission's services is billed for those costs associated with actual Section 9 regulatory activities, as required by Congress.

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[16] See, e.g., Hughes Communications Galaxy, Inc., 3 FCC Rcd 7119 (1992) (FCC recognizes public interest benefits inherent in state-of-the art hybrid satellites). See also Amendment of C-band Satellite Orbital Spacing Policies to Increase Satellite Video Services to the Home; GE Americom Communications, 3 FCC Rcd 6871 (1988) (establishment of high density arc at Ku-band for direct-to-home video service).

[17] See, e.g., Domestic Fixed Satellite Transponder Sales, 90 F.C.C. 2d 1238 (1982) aff'd Wold Communications v. F.C.C., 735 F. 2d 1465 (D.C. Cir. 1984) (space station operators permitted to provide transponder capacity individually on a non-common carrier basis); GTE Spacenet Corp., 8 FCC Rcd 3078 (1993) (GSTAR III authorized to operate at orbital inclination greater than 5 degrees to prolong useful life).

[18] See, e.g., COMSAT General Corp., 6 FCC Rcd 3345 (1991) (FCC establishes a new policy for Domsat's which remain operational beyond their original 10 year license term).

4. The Proposed $142,250 Fee Is Excessive And Appears To Exceed The Costs Of Regulation.

Congress has made clear, and the Commission has acknowledged, that the Communications Act requires the Commission to recover the actual annual costs of its Section 9 activities, from the benefiting regulatee.[19] However, we believe that the proposed $142,250 fee does not accurately reflect the actual costs of regulating domestic satellites. Thus, as discussed below, while regulation of the Domsats was pervasive ten years ago, the Commission's staff today performs only limited Section 9 activities benefiting Domsat licensees.[20]

a. Deregulation has Sharply Reduced the Costs Incurred With Respect To The Commission's Section 9 Policy And Rulemaking Activities For The Domsat's.

During the domestic satellite industry's embryonic years, it was unclear how the market for domestic satellite services would develop. In view of this uncertainty and perceived financial and operational risks, governmental regulation of the industry was necessarily extensive. Working from a blank slate, regulatory standards were developed in the 1970's and 1980's to facilitate

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[19] See House Conf. Rep. No. 103-213, 103rd Cong. 1st. Sess. reported at 7A U.S. Code Cong. and Admin. News 1088, 1188 (1993); FY 1994 Order, 8 FCC Rcd at 5335; Notice, at ¶ 6.

[20] Indeed, because of the limited role of the Domestic Satellite Radio Branch, it has recently been re-organized and consolidated within the Commission's International Bureau to enable its employees to take on additional tasks.

the efficient development of this national resource.[21]

Now, however, the domestic satellite industry is mature. Regulations which have been outdated by technological changes or whose purposes can be more efficiently achieved through the operation of a competitive marketplace, have been eliminated. As a result, government regulation of domestic satellites has been sharply reduced to an oversight role. There is little, if any, future need for additional ground-breaking policy or rulemaking decisions. Instead, the Common Carrier Bureau's policy making arm only acts from time to time to fine tune whatever government regulation remains necessary to promote the public interest.

COMSAT General is aware of only one pending rulemaking proceeding directly affecting its Part 25 domestic satellite operators, i.e. the two degree spacing FNPRM,[22] and the pleading

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[21] See, e.g., Domestic Communications Satellite Facilities, 22 F.C.C. 2d 86 (1970); Domestic Communications Satellite Facilities, 35 F.C.C. 2d 844 (1972), recon. in part, 38 F.C.C. 2d 665 (1972); Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 84 F.C.C. 2d 584 (1980); Processing of Pending Space Station Applications in the Domestic Fixed-Satellite Service, 77 F.C.C. 2d 956 (1980); Licensing of Space Stations in the Domestic Fixed-Satellite Service, 88 F.C.C. 2d 318 (1981); Domestic Fixed-Satellite Service, 30 F.C.C. 2d 1 (1982), recon. den. GTE Satellite Corp., 93 F.C.C. 2d 832 (1983); Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 3 FCC Rcd 6972 (1988); Domestic Fixed-Satellite Transponders Sales, 88 F.C.C. 2d 1419 (1987); Satellite Carriers Transponder Assignment Procedures, 88 FCC 2d 1477 (1988).

[22] Amendment of Part 25 of the Commissions's Rules to Reduce Alien Carrier Interference Between Fixed-Satellites at Reduced Orbital Spacings and to Revise Application Processing

cycle in that 1993 proceeding has long been completed. In FY 1995, the Commission may also initiate a rulemaking related to the use of C-band earth stations in the maritime environment, which may require policymaking efforts by the staff affecting certain Domsats.[23] Other than these two proceedings, COMSAT General is aware of any significant policy and rulemaking activities now underway or proposed for FY 1995, requiring significant expenditure by the Commission's staff for the Domsats or specifically, for SBS-2, SBS-3, COMSTAR D-4 and the Marisat satellites.

b. The Cost Of The Commission's Section 9 Enforcement Activities Is Minimal.

Similarly, the Commission's enforcement machinery is only rarely called upon to interdict market forces. Problems between satellite operators are invariably resolved through cooperation and intersystem coordination. As recognized by the Commission, "since the early days of domestic satellite industry, interference problems have always been resolved by cooperation between satellite operators."[24] Complaints from consumers and

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Procedures for Satellite Communications Services, 8 FCC Rcd 1316 (1993) (Notice of Proposed Rulemaking).

[23] See Request for Rulemaking filed by Crescomm Transmission Services, Inc., RM-7912, filed December 12, 1991.

[24] See Amendment of Part 25 of the Commission's Rules to Reduce Alien Carrier Interference Between Fixed-Satellites at Reduced Orbital Spacings, 8 FCC Rcd 1316, 1317 (1993). Accord Hughes Communications Galaxy, Inc., 7 FCC Rcd 4672, 4673 (1992) ("[FCC] will not become involved in coordination unless the

customers requiring Commission investigation and enforcement are virtually non-existent. Thus, since launching its COMSTAR D-1 domestic fixed-satellite in 1976, COMSAT General is aware of no customer complaint against it requiring Commission intervention or enforcement activities. Accordingly, we believe the overall scope of the Domsat's Section 9 enforcement activities must be limited, at best, to one or two full-time employees and associated overhead. Only some small portion of these enforcement costs should be assessed to the six feeable COMSAT General satellites.

c. User Information Services Are Limited.

While COMSAT General and the satellite operators certainly stand ready to pay their fair share of the costs associated with user information services, it must be noted that the Commission's "domestic" public reference room in 2025 M Street is staffed, we believe, by one full-time employee and is shared with the Multipoint Distribution Service. This reference room is not computerized but relies on a "sign-out method" for obtaining reference materials. The facility is open to the public only 26 hours per week; it is closed on Fridays. The physical space allocated to the public consists of about sixty square feet; we believe an additional six to seven hundred square feet is devoted to government file cabinets containing the relevant reference

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parties, after exhaustive good faith efforts, are unable to reach agreement.").

materials.

While we believe the cost of these services is minimal, the Notice contains no cost breakout to enable a payee to determine whether the total cost of user information services, or whether that portion of the cost assigned to satellite operators for user information services provided through this reference room, is reasonable.[25] In any event, as the sum total of available files related to feeable domestic space stations is quite small, we believe the cost of services provided through the domestic reference room is minimal.

d. The Cost of the Commission's International Activities Cannot Be Determined Absent Additional Information.

It seems clear that there are costs associated with the Commission's international activities and liaison with the ITU which benefit Domsat licensees and COMSAT General's feeable satellites. However, while the Commission's international activities remain important to domestic satellite operators, these functions are somewhat limited by the nature of the operator's ten-year license period and the ITU advance

[25] In this regard, it should be noted that the overwhelming majority of services provided via this reference room are provided in support of the Commission's earth station licensees. These licensees must be assessed for their fair share of the user information services provided through this reference room.

notification process.[26] With a proper accounting, COMSAT General and other licensees will be better able to ascertain the cost of regulating these Section 9 activities and whether that cost is reasonable.

5. The Proposed $142,250 Fee Contravenes The Public Interest.

In view of the minimal regulation required for the Domsat industry, the $142,250 fee works an unnecessary hardship, particularly on operators of satellites which are operated beyond their nominal lifetimes. These satellites, such as the MARISATs, COMSTAR D-4, SBS-3 and SBS-2, remain fully viable as low-cost providers of full-time or occasional use commercial services and provide back-up capability and space segment used to support scientific testing or small business use. However, for COMSAT General, the annual $142,250 fee acts as a disincentive for maintaining these satellites in orbit, since we cannot be certain that prospective revenues will even cover the regulatory fee in a given fiscal year. Further, the excessive nature of the fee impedes and removes incentives for competitive price discounting, discourages the exploitation of innovative satellite technologies and harms consumers by resulting in higher prices for services which do not meet their needs. In our experience, this latter

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[26] The major function performed by the Commission's staff with respect to space stations relates to assigning orbital locations to various applicants. However, each applicant submits a fee for this service with its individual application to enable the FCC to recover its costs.

problem will prove particularly detrimental to start-up and small businesses requiring low-cost space segment to enable their enterprises to succeed.

Conclusion

COMSAT General has established in detail that the Commission's blanket approach to fee assessment "has failed to consider . . . important aspect[s] of the problem" and the agency has offered an explanation for its proposed fees "which runs counter to the evidence before it . . . in violation of the APA."[27] Elementary principles of fairness and due process require the Commission to respond by identifying the precise benefit of its Section 9 activities for each individual licensee and by showing that its annual fees reasonably reflect the cost of regulation.

Respectfully submitted,

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[27] People of Calif. v. F.C.C., 905 F. 2d 1217, 1230 (9th Cir. 1990) quoting Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 43 (1983). See also Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); People of Calif. v. F.C.C., 39 F. 3d 919, 925 (9th Cir. 1994).